3357

SUPREME COURT OF THE UNITED STATES.

No. 172.

CHARLES EMERSON, PL'FF IN ER.,

vs.

HORATIO N. SLATER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and fifty-eight—

Before the honorable Peleg Sprague, district judge:

CHARLES EMERSON, of Boston, in said district of Massachusetts, a citizen of said State of Massachusetts, gentleman, plaintiff,
versus
HORATIO N. SLATER, of Providence, in the district of Rhode Island, a citizen of said State of Rhode Island, gentleman, defendant.

In a plea of the case, for that whereas the defendant, at Boston, in said district of Massachusetts, on the fourteenth day of November last, in consideration of the promise and agreement of the plaintiff to complete all the bridge-work which the said plaintiff had contracted to do for the Boston and New York Central Railroad Company by the first day of December then next, promised and agreed to and with the plaintiff, that upon the completion of the said bridges, and when the rails for one track should be laid to the foot of Summer street, in said Boston, from Dedham, in the county of Norfolk, he, the said defendant, would give to him, the said plaintiff, his, said defendant's, five notes for two thousand dollars each, to bear date at the time the same should be given, and to be made payable in six months from their date to the plaintiff or his order. And the plaintiff says that he performed and completed all the bridge-work that he had contracted to do for the said Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the first day of December last past, and that the said bridges were completed and the rails for one track were laid to the foot of Summer street, in Boston, from Dedham, on the tenth day of December now last past. Yet the said defendant, though requested, to wit, on the first day of January last past, did not give to the plaintiff his, said defendant's, five notes for two thousand dollars each, payable in six months from date to the said plaintiff or his order, or either of them, but neglected and refused, and still refuses so to do.

And the plaintiff further says, that at said Boston, on the fourteenth day of November now last past, the defendant, by his agreement in writing of that date, in consideration of the promise and

agreement of the plaintiff to complete all the bridge-work to be done by the plaintiff for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track by the first of December then next, agreed with the said plaintiff to pay him, within two days from the said date, the sum of forty-four hundred dollars in cash; and further that he, the said defendant, would, on the completion of said bridges, and when the rails for one track should be laid to the foot of Summer street, in said Boston, from Dedham, give to the plaintiff his, the said defendant's, five notes for two thousand dollars each, dated when said notes should be given, and payable in six months from their dates to the said plaintiff or his order. And the plaintiff says, that he completed the said bridges, and that the rails for *on* track were laid to the foot of Summer street, in said Boston, from Dedham, on the twentieth day of December now last past. Yet the said defendant, though requested, to wit, on the first day of January last past, did not give to the plaintiff his, the said defendant's, five notes for two thousand dollars each, payable to the plaintiff or his order, in six months from their date, or either of them, but neglected and refused, and still refuses so to do.

And the plaintiff further says, that at said Boston, on the fourteenth day of November now last past, the defendant, by his agreement in writing of that date, in consideration of the promises and agreements of the plaintiff in said agreement contained, promised and agreed to and with the plaintiff, that upon the completion of the bridges upon the Boston and New York Central Railroad Company, which the said plaintiff was then constructing, and when the rails for one track should be laid to the foot of Summer street, in said Boston, from Dedham, promised the plaintiff to give him, the said defendant's, five notes for two thousand dollars each, to be dated when the same were given, and payable in six months from date to the plaintiff or his order. And the plaintiff says, that the said bridges were completed, and the rails for one track were laid to the foot of Summer street, in Boston aforesaid, from Dedham aforesaid, on the twentieth day of December last past; yet the defendant, though requested, to wit, on the first day of January last past, did not give the plaintiff his, the said defendant's, five notes for two thousand dollars each as aforesaid, or either of them, but neglected and refused, and still refuses and neglects so to do.

In a plea of the case, for that the said defendant, on the day of the purchase of this writ, being indebted to the plaintiff in fifteen thousand dollars, for goods sold and delivered by the plaintiff to the defendant; and in the same amount for work done and materials for the same provided by the plaintiff for the defendant at his request; and in the same amount for money lent by the plaintiff to the defendant; and in the same amount for money received by the defendant to the use of the plaintiff; and in the same amount for money paid by the plaintiff for the use of the defendant at his re-

quest; and in the same amount for money due from the defendant to the plaintiff, for interest of money before then due and owing from the defendant to the plaintiff, and by the plaintiff forborne to the defendant, at the defendant's request, for a long time before then elapsed; and in the further sum of dollars and cents, according to the account annexed, in consideration thereof, promised to pay the same amount to the plaintiff on demand; yet he has not paid the same, to the damage of the said plaintiff, as he says, the sum of fifteen thousand dollars.

The following additional count was, by consent of defendant's attorney, filed in the clerk's office of this court on the 8th October, 1855, viz:

And the plaintiff further says that the defendant, at said Boston, on the fourteenth day of November last, in consideration of the promise and agreement of the plaintiff to complete all the bridge-work which the said plaintiff had contracted to do for the Boston and New York Central Railroad Company, ready for laying down the iron rails for one track, by the first day of December then next, promised and agreed to and with the plaintiff, that he would pay him, within two days from the said fourteenth day of November, the sum of forty-four hundred dollars in cash, and further that he, the said defendant, would, on the completion of the said bridges, and when the rails for one track should be laid to the foot of Summer street, in said Boston, from Dedham, in the county of Norfolk, give to the plaintiff his, said defendant's, five notes for two thousand dollars each, to bear date at the time when the same should be given, and to be made payable in six months from their date to the plaintiff or his order. And the plaintiff says the defendant waived the performance of said agreement by said plaintiff to complete said bridge-work by the said first day of December, and extended the time for the completion of said bridge-work from the said first day of December to the twentieth day of said December. And the plaintiff says that he performed and completed all the bridge-work that he had contracted to do for the Boston and New York Central Railroad Company on the fifteenth day of December last, and that the rails for one track were laid to the foot of Summer street, in said Boston, from said Dedham, on the twentieth day of said December; yet the said defendant, though requested, to wit, on the first day of January last past, did not give the plaintiff his, the said defendant's, five promissory notes of two thousand dollars each, payable to the plaintiff or his order in six months from their date, or either of them, but neglected and refused, and still neglects and refuses so to do.

At the May term, A. D. 1855, of this court, the following plea and issue were filed, viz:

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And the said defendant, by his attorneys, Smith & Bates, comes and defends the wrong and injury, when, &c., and says he did not undertake or promise, in manner or form as the plaintiff hath in the several counts in his declaration complained against him, and of this he puts himself upon the country. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.

By his attorneys, SMITH & BATES.

And as to the above plea pleaded by the defendant, the plaintiff doth the like.

HUTCHINS & WHEELER, *for Plaintiff*.

This action was entered at the May term of this court, A. D. 1855, and was thence continued to the October term of the same year, when a judgment was rendered on a verdict returned therein, and exceptions were taken and allowed; and thereupon a writ of error was issued, returnable before the Chief Justice and Associate Justices of the Supreme Court of the United States, at Washington, on the first Monday of December then next.

Afterwards, to wit, at the May term of this court, A. D. 1857, a mandate of said Supreme Court of the United States was presented and filed, whereby it appeared, among other things, that the said judgment was reversed, and this cause was remanded by said Supreme Court to this circuit court, with directions to award a venire facias de novo; and thereupon it is ordered by the court here that this case be brought forward, and the judgment rendered therein at the October term, A. D. 1855, be set aside and annulled, and a venire facias de novo be awarded. The case was thence continued to this present term; and now, issue having been joined as aforesaid, it was committed to a jury sworn according to law to try the same, who, after hearing all matters and things concerning the same, returned their verdict therein, as follows:

The jury find that the defendant never promised in manner and form as the plaintiff hath thereof declared against him.

Thereupon it is considered by the court that said Horatio N. Slater do recover against the said Charles Emerson his costs of suit, taxed at (to wit, June 26.)

Upon the trial of the said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the said Emerson filed his bill of exceptions, which was sealed and allowed by the court, and is in the words and figures following:

Bill of Exceptions.

Be it remembered, that at a term of a circuit court of the United

States for the first circuit, holden at Boston, within and for the district of Massachusetts, on the fifteenth day of May, eighteen hundred and fifty-eight, by the honorable Peleg Sprague, district judge, came Charles Emerson, of Boston, in said district, and by an action of special assumption declared against Horatio N. Slater, of Providence, in the district of Rhode Island, and a citizen of the State of Rhode Island, as by the writ and declaration of record will appear, to which the defendant pleaded the general issue, which was joined, and thereupon came on for trial before the said circuit court at said May term, before a jury empannelled for that purpose; and the said plaintiff then and there, to maintain and prove the issue on his part, submitted to the court and jury the following documents and oral testimony, to wit:

Agreement between the Plaintiff and Defendant.

This agreement, made this fourteenth day of November, A. D. 1854, by and between Charles Emerson, of Boston, Massachusetts, and H. N. Slater, of Providence, Rhode Island, witnesseth: That the said Emerson, in consideration of the agreements of said Slater, hereinafter contained, and of one dollar to him paid, the receipt whereof is hereby acknowledged, covenants and agrees with said Slater that he, the said Emerson, will complete all the bridge-work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the rails for one track, by the first day of December next.

And the said Slater, in consideration of the premises, hereby agrees that he will pay him, within two days from the date hereof, the sum of forty-four hundred dollars in cash; and the said Slater further agrees that he will give to the said Emerson, on the completion of the bridges, and when the rails for one track are laid to the foot of Summer street, in Boston, from Dedham, his, said Slater's, five notes for two (2) thousand dollars each, dated when said notes are given as above provided, and payable in six months from their date to said Emerson on his order. Said notes, when paid, are to be applied towards the indebtedness of said Boston and New York Central Railroad Company to said Emerson—it being understood that this agreement is in no way to affect any contract of said Emerson with said company, or any action now pending between them.

(Signed) CHARLES EMERSON,
H. N SLATER.

The execution of which agreement was admitted, and also the payment of forty-four hundred dollars at the time stipulated by said Slater to said Emerson, and that a demand was made by the plaintiff on the defendant prior to this suit of the notes mentioned in said agreement.

The plaintiff then offered to prove, by parol, that after November

14, 1854, and before the 1st day of December, 1854, and after the 1st day of said December, the defendant, by his conduct, acts, and declarations, waived and dispensed with the performance of the work by the plaintiff, on the first of said December, and agreed to substitute therefor performance thereof on or before the 20th day of December, 1854, and to deem performance by the plaintiff on or before the 20th of December, 1854, a substitute for and equivalent to performance on the 1st day of said December, and according to the contract, and that the corporation also assented thereto, and that the work was fully performed within the extended time.

This testimony was objected to by the defendant, upon the ground that the contract of November 14, 1854, was a special promise for the debt, default, or misdoings of another, and was within the statute of frauds, and that the alleged waiver, extension, and substitution were not by writing.

The court sustained the objection, and excluded the testimony, to which ruling the plaintiff then and there excepted.

The plaintiff then proposed to proceed upon the common counts, giving notice that he adhered to the said exception, and give the following evidence, to wit: The agreement between the plaintiff and defendant, dated Nov'r 14, 1854, hereinbefore referred to; three deeds from the Boston and New York Central Railroad Company to the defendant, each dated November 17, 1854, of certain real estate described therein, given to indemnify the defendant from his liability in said contract, dated Nov'r 14, 1854, with the plaintiff, as follows:

Know all men by these presents, that the Boston and New York Central Railroad Company, duly established as a corporation by the laws of Massachusetts, in consideration of two thousand dollars to them paid by Horatio N. Slater, of Providence, in the State of Rhode Island, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Slater, his heirs and assigns, a certain piece of land situated in Bird street, so called, in the town of Dorchester, and county of Norfolk, and Commonwealth of Massachusetts, bounded and described as follows, viz: Southeasterly by said Bird street, there measuring fifty-five feet; southwesterly by land of Stephen Baker, one hundred and twenty-nine feet and six inches; northwesterly by land of said Stephen Baker; northeasterly by land of Patty Baker, one hundred and twenty-eight feet and ten inches, containing five thousand eight hundred and twelve feet and six inches, together with the buildings thereon, and the privileges and appurtenances thereto belonging; reserving, however, and this deed shall in no way be construed to give to the grantee any right in or to a strip of land forty feet wide running through said premises, over which said company have located their railroad, which strip is particularly described in their location, filed with the county commissioners of

Norfolk, the same being the premises conveyed to said company by deed of Calvin Bird, recorded in Norfolk, lib. 227, fol. 68:

To have and to hold the above-granted premises to the said Slater, his heirs and assigns, to his and their use and behoof forever. And the said company, for itself and its successors and assigns, do covenant with the said Slater, his heirs and assigns, that it is lawfully seized in fee-simple of the afore-granted premises; that they are free from all incumbrances; that they have good right to sell and convey the same to the said Slater, his heirs and assigns, forever as aforesaid; and that it will, and its successors and assigns shall, warrant and defend the same to the said Slater, his heirs and assigns, forever, against the lawful claims and demands of all persons.

In witness whereof, the said Boston and New York Central Railroad Company have hereunto set their hand and corporate seal, by Edward Haynes, jr., their treasurer, thereto duly authorized, this seventeenth day of November, in the year of our Lord eighteen hundred and fifty-four.

BOSTON & NEW YORK CENTRAL
RAILROAD COMPANY,
By EDWARD HAYNES, JR., *Treasurer*. [SEAL.]

Signed, sealed, and delivered in presence of—Forty-eight printed words first erased, and the words "successors and assigns" twice interlined before signing—

SAM'L W. BATES.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss: *Nov.* 17, 1854.

Then personally appeared the above-named Edward Haynes, jr., treasurer, and acknowledged the above instrument to be the free act and deed of said company.

Before me, SAMUEL W. BATES,
Justice of the Peace.

Know all men by these presents, that the Boston and New York Central Railroad Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, in consideration of fifteen hundred dollars to them paid by Horatio N. Slater, of Providence, in the State of Rhode Island, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Slater, his heirs and assigns, a certain parcel of land situated in Dorchester, in the county of Norfolk, and Commonwealth of Massachusetts, with the buildings thereon standing, bounded as follows, to wit: Beginning at the northeast corner of lot numbered nine (9) on a plan of house-lots belonging to John Williams and B. T. Loring, and recorded in the registry of deeds

in Norfolk, and running in an easterly direction to lot numbered eleven (11) on said plan, one hundred and twenty three feet and seven inches; thence in a southerly direction to a picket fence, one hundred and eight feet and four inches; thence westerly to lot nine, (9,) one hundred and one feet and six inches; thence northerly to point of beginning, one hundred and seven feet and ten inches, being part of lot numbered ten (10) on said plan, and containing twelve thousand one hundred and fifty feet, more or less; reserving, however, and this deed shall in no way be construed to give to the grantee any right in or to a strip of land forty feet wide running through said premises, over which said company have located their railroad, and which strip is more particularly described in their location, filed with county commissioners of Norfolk. These premises *and* conveyed subject to a mortgage of fifteen hundred dollars, in favor of one John Damon, which said Slater agrees to have discharged, and to save said grantor harmless from the same—the premises being the same conveyed to grantor by deed of said John Damon, dated May 23d, A. D. 1854, and recorded with this deed:

To have and to hold the above-granted premises to the said Slater, his heirs and assigns, to his and their use and behoof forever.

And the said Boston and New York Central Railroad Company, for themselves and their successors and assigns, do covenant with the said Slater, his heirs and assigns, that they are lawfully seized in fee-simple of the afore-granted premises; that they are all free from all incumbrances save as above; that they have good right to sell and convey the same to the said Slater, his heirs and assigns, forever, save as aforesaid; and that they will, and their successors and assigns shall, warrant and defend the same to the said Slater, his heirs and assigns, forever.

In witness whereof, the said Boston and New York Central Railroad Company have hereunto set their hand and corporate seal, by Edward Haynes, jr., their treasurer, thereto duly authorized, this seventeenth day of November, in the year of our Lord eighteen hundred and fifty-four.

BOSTON & NEW YORK CENTRAL
RAILROAD COMPANY,
By EDWARD HAYNES, JR., *Treasurer.* [SEAL.]

Signed, sealed, and delivered in presence
of—Forty-eight printed words first
erased, and the words "successors and
assign'd" being first interlined twice—
SAMUEL W. BATES.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss: Nov. 17, 1814.

Then personally appeared the above-named Edward Haynes, jr., treasurer, and acknowledged the above instrument to be *their* free act and deed of said company. Before me,
SAM'L W. BATES, *Justice of the Peace.*

Know all men by these presents, that the Boston and New York Central Railroad Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, in consideration of ten thousand dollars to them paid by Horatio N. Slater, of Providence, Rhode Island, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Slater, his heirs and assigns, forever, a certain piece of land situated in Dorchester, in county of Norfolk, and Commonwealth of Massachusetts, and bounded as follows, to wit: Beginning on the northeasterly corner thereof on Cottage street, and running northwesterly one hundred and fifty-three feet and ten inches to land of Cornelius Bramhall; thence running southwesterly three hundred and two feet; thence running northwesterly one hundred and forty-three feet six inches to land of James Jenkins; thence running southwesterly one hundred and eighty-seven feet to land of Taylor; thence running southeasterly three hundred and ten feet and ten inches to land of George M. Brown; thence running northeasterly four hundred and eighty-nine feet and six inches to point of beginning.

The above premises are conveyed subject to any and all rights in or to any passage ways or way heretofore conveyed by Joseph Ballister to James Jenkins; reserving, however, and this deed shall in no way be construed to give to the grantee any rights in or to a strip of land forty feet wide running through said premises, over which said company have located their railroad, which strip is particularly described in their [location,] filed with the county commissioners of Norfolk, the same being the premises conveyed to grantor by deed of Joseph Ballister, of date May 19th, A. D. 1854, and recorded with this deed—reference may be had for greater certainty:

To have and to hold the above-granted premises to the said Slater, his heirs and assigns, to his and their use and behoof forever.

And the said Boston and New York Central Railroad Company, for themselves and their successors and assigns, do covenant with the said Slater, *their* heirs and assigns, that they are lawfully seized in fee-simple of the afore-granted premises; that they are free from all incumbrances save as above; that they have good right to sell and convey the same to the said Slater, his heirs and assigns, forever; and that they will, and their successors and assigns shall, warrant and defend the same to the said Slater, his heirs and assigns, forever, against the lawful claims and demands of all persons.

In witness whereof, the said Boston and New York Central Railroad Company have hereto set their hand and corporate seal, by Edward Haynes, jr., their treasurer, thereto duly authorized, this

seventeenth day of November, in the year of our Lord eighteen hundred and fifty-four.

BOSTON & NEW YORK CENTRAL
RAILROAD COMPANY,
By EDWARD HAYNES, JR., *Treasurer.* [SEAL.]

Signed, sealed, and delivered in presence of—Forty-eight printed words first erased, and the words "successors and assigns" being first twice interlined—
SAMUEL W. BATES.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss: Nov. 17, 1854.

Then personally appeared Edward Haynes, jr., treasurer, and acknowledged the above instrument to be the free act and deed of said corporation. Before me,

SAM'L W. BATES,
Justice of the Peace.

Also the following contract between the defendant and Boston and New York Central Railroad Company:

Memorandum of an agreement made and concluded this twenty-third day of September, A. D. 1854, by and between H. N. Slater, of Providence, in the State of Rhode Island, and the Boston and New York Central Railroad, by J. C. Hurd, their agent thereto specially authorized, witnesseth: The said Slater agrees to lease, and by these presents doth lease, to the said company ten hundred and fifty tons of railroad iron, compound rail, to be laid down and used by said company on their railroad. The said company agree to pay to said Slater, for the use of said iron, five thousand dollars per month, the first payment to be made upon the first day March, A. D. 1855, and so upon the first day of each succeeding month till they shall have paid to him sixty-eight thousand four hundred forty-five dollars, and the interest on the same from the sixteenth day of September, A. D. 1854.

The said company hereby assign and set over to the said Slater the proceeds of their railroad, to the amount of sixty-eight thousand four hundred and forty-five dollars, and interest on the same from the sixteenth day of September, A. D. 1854, and authorize and require the superintendent to retain in his own hands, out of the proceeds of said railroad, a sufficient sum of money to pay the said amount to the said Slater at the said times, and they hereby authorize and require said superintendent to pay to the said Slater, out of the said sum so retained by him, five thousand dollars on the first day of March, A. D. 1855, and the same sum on the first day of each succeeding month, till he shall have paid the said sum of sixty-eight thousand four hundred and forty-five dollars, and the

interest on the same from the said sixteenth day of September, A. D. 1854.

If there should be any defaults of said payments to said Slater, the said company hereby authorize the said Slater to take up and remove the said iron leased by him to them, though the same be put down and used upon the railroad. If there shall be no default of said payments, the said Slater agrees, when the said sixty-eight thousand four hundred and forty-five dollars and the said interest shall have been paid to him as aforesaid, that then he will sell and deliver to said company the said iron leased by him as aforesaid, giving them a receipt in full of all demands for the use of said iron, and a release of all his interest in and to the same without further consideration.

In testimony whereof, the said H. N. Slater and the said Boston and New York Central Railroad Company, J. C. Hurd, have hereunto set their hands and seals the year and day first above mentioned.

(Signed) H. N. SLATER, and
B. & N. Y. C. R. R. CO.,
By their agent, duly authorized by vote of said company,
J. C. HURD.

Witness, S. W. BATES.

I hereby agree with the Bay State Iron Company, that the money received by me under the contract of which the foregoing is a copy, shall be applied by me forthwith upon the note of the Boston and New York Central Railroad Company, given by me to them in payment of iron bought of them by me.

H. N. SLATER.

BOSTON, *October 25th*, 1854.

Charles Emerson called by plaintiff.

I built bridges for the Boston and New York Central Railroad Company. I contracted to build them in the fall of 1853 and spring of 1854. The corporation failed in July, 1854. I agreed to build them six or seven bridges, the two largest by contract in writing, the rest by verbal contract. I stopped work in July, 1854. The company then owed me some $25,000 or $30,000. I stopped work, and nothing was done till last of August, when a new agreement was made, by which I went on with the work till into November. At the time I made the contract with the defendant, I had stopped work and refused to go on. Four of the bridges were then finished, and four of them were unfinished. The defendant was a large stockholder and bondholder in the corporation at the date of the contract of November 14. The bonds were secured by a mortgage to trustees of the road. As soon as the contract with the defendant was made, I resumed work on the bridges, and finished them about the middle of December, 1854. The rails were

laid about the 20th of December to the foot of Summer street. After Nov. 14, and before Dec. 1, I was repeatedly told by some of the officers of the corporation, in Slater's presence, to which he made no objection, (he was a silent man, and said not much,) that if I kept out of the way of the track-layers it was all they wanted, and I did so. There was never any delay because the bridges were not ready. The track-layers were delayed almost every day for the want of iron. The defendant was occasionally upon my work. I met him and the other directors almost every day after my agreement with him, and before Dec'r 1, and after Dec. 1st, till the bridges were complete. Can't say Slater took any part in conversation, but he was present. He never objected because my work was not done by December 1st, nor did he ever intimate to me that he should take advantage because it was not done by that time. I never heard any objection that the work was not done by Dec'r 1, till after this suit was brought. About the 24th Nov'r, 1854, the defendant and Farnum and Crane, three directors of the corporation, came to the Cottage Street bridge, while I was at work upon it, and Farnum requested, in Slater's presence, that the bridge might be done by December 4th, and asked me if I could do it, as they wanted to run a gravel train over it to fill up in South Boston. I don't recollect that Slater said anything. I told them I thought I could, and told them also I would take some of my men from other parts of my work, and did so, and they sent some of the corporation hands to help me. The bridge, with this increased force, was completed by December 4th, by working nights and Sundays. I met the defendant about the middle of December, 1854, upon the Federal Street bridge. He asked me how I got along, and I told him, and I made some inquiries of him as to the receipts of the road. He said, when the work was done and the trains running we should all feel like a boy on a young horse. The iron mentioned in defendant's contract with the company was laid over bridges built by me on the 20th of December, 1854.

After completing the work, I think, in January, 1855, I met the defendant, two of the directors of the company, who were chosen a committee to settle with me; I presented to them my account, crediting them with the payments made by defendant, and with the notes which he agreed by the contract to give me. Some specific objections were made by others of the committee to the items of my account, but no objection was taken that my work was not done seasonably. I also saw defendant afterwards three or four times before the suit was brought. After the completion of my work, the defendant promised to pay me seven thousand dollars if I would release certain attachments of real estate of the company held by me and one Sidney Dillon. These attachments Dillon and myself subsequently offered to discharge. I told him I had done all I agreed to about the attachments.

The defendant had $17,000 in bonds, secured by mortgage of

the road and other property of said corporation, placed in his hands by said corporation to indemnify upon his contract with me, and some real estate was also conveyed to him. These securities he still holds. The materials furnished and work done by me for the completion of the bridges after December 1st amounted to about $10,000 or 12,000 dollars. I gave credit to the defendant alone; the corporation was worthless. The only reason given by the defendant why he would not pay me was because the securities held by him had deteriorated. I suppose I could have done the work by the first of December by working nights and Sundays.

The following is the contract referred to by said Emerson in his testimony:

Memorandum of an agreement made and concluded this seventeenth day of December, one thousand eight hundred and fifty-three, by and between the Boston and New York Central Railroad Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, party of the first part, and Charles Emerson, of Boston, in the county of Suffolk, and Commonwealth aforesaid, party of the second part, witnesseth:

That for and in consideration of the covenants and agreements of the party of the first part hereinafter mentioned, the said party of the second part agrees, to and with the said party of the first part, to build and complete, sufficient for the passage of an engine over the same, on or before the first day of May next, all the bridging as now laid out and determined upon by the engineer of said railroad, from the wharf near the foot of Summer street, in said Boston, to South Boston, and from South Boston across the South Bay, so called, to the Dorchester shore, in Dorchester, in the county of Norfolk, in the manner and with the materials hereinafter described, and to finally complete the same and everything hereinafter specified to the satisfaction and acceptance of the State commissioner and the engineer of the said railroad, so soon after the said first day of May next as may be.

From the said wharf to the easterly line of the commissioners, across the Fore Point Channel, so called. The bridge to be built about eight hundred feet in length, with oak piles six in a bent or pier, with spur shores thoroughly driven; piers to be eighteen feet from centre to centre of caps; caps to be 14 × 14 inches; track-stringers and bolsters 14 × 14 inches; top stringers for holding mud and gravel 10 × 10 inches, all of the best white pine; covering to be 7 inches thick; piers to be girdered and braced with oak similar to the Fitchburg R. R. bridge across Charles river, covered with 12 inches of marsh mud and eight inches of good clean gravel, with cast-iron scuppers put in to let off the surface water; railing to be put on the sides of the bridge, and the railing to be planed and finished thoroughly in a workmanlike manner and painted; two

draw-piers, one hundred and fifty feet each in length, and not less than eighteen feet wide, to be built of oak piles and caps of white pine, to be planked down to low water mark on the fronts, with two oak girders on the fronts the entire length; piers to be braced in the best and strongest manner, to be covered with 7-inch covering and 12 inches of mud, and eight inches of gravel put on the same as the main bridge, with all necessary belay posts and ring balls for the convenience of vessels. The foundation for the draw to be built of oak piles, solid and substantial, and the draw of the most approved plan, twenty-five feet wide, sufficient for two tracks, with thirty feet opening for vessels, to be put on in the best manner to run off and on easily; the main bridge to be twenty-six feet wide, with two tracks well and thoroughly laid and put down the entire length; the railroad company furnishing the iron rails, chairs, spikes, and sleepers for the track; the said Emerson furnishing all the other materials and doing all the labor; the bridge to be in every respect as to the workmanship and materials equal to the Fitchburg railroad bridge across Charles river.

The rest of the bridging, about six thousand feet in length, to be twenty-six feet wide, with six spruce piles in a pier, and outside spur shores where necessary; piers to be about fourteen feet apart, well capped, with sufficient track and outside stringers, strongly braced and covered, at intervals of two feet, with three-inch spruce plank extending across the whole width of the bridge; two tracks to be well laid and spiked down; the whole to be done to the satisfaction of the engineer of the company, strong and sufficient for the passage of engines and cars with speed and safety; the said Emerson furnishing all the materials and doing all the labor, excepting the iron rails, chairs, and spikes, which are to be furnished by the railroad company; and said draw and bridges are to be made at such elevation above tide as the engineer of the company shall deem proper, and be built on a level grade, except such portions of the same as said engineer may think proper to have constructed on an inclination. And the said party of the first part, for and in consideration of the foregoing, agree to and with the said Emerson, party of the second part, to pay him for the oak pile bridge twenty-five dollars for each foot in length of said bridge; for the draw piers and draw, the sum of nine thousand ($9,000) dollars; for the spruce pile bridge, the sum of seven dollars for each foot in length of said spruce bridge—payment to be made by said railroad company to said Emerson as follows: between the first and fifth of each month, for all materials delivered during the preceding month, eighty-five per cent. of their estimated value; and for all labor performed during the preceding month, seventy-five per cent. of its estimated value, upon the estimate and requisition of the engineer of said railroad company, and the balance upon the completion and acceptance of the whole work.

In witness whereof, we have affixed our hands and seals this twenty-third day of December, A. D. 1853.

WELCOME FARNUM,
EDWARD CRANE,
Executive Com. B. & N. Y'k Central Railroad Co., duly authorized.
CHARLES EMERSON.

In presence—E. HAYNES, JR.

Benjamin Collins.

Worked on Cottage Street bridge; am a builder. On the 14th of November or 1st of December, or in that neighborhood, was at work there; at interview was present when Crane, Farnum, and Slater came there first; afterwards Emerson came; I think Farnum and Slater came together, and about the same time by another conveyance, and Emerson afterwards. This was on November 24, 1854. All were there and talking together. There was some conversation about getting bridge done so that track could be laid over it. They wanted to know if work could be done by December 4th. I told them I thought not, unless more men were employed. They said *the* wanted to get done so as to get gravel out of the cut at the end of the bridge. The arrangement was that we should get the bridge done by December 4th, and it was done December 2d to lay iron, and some of it was laid, I think, on the 4th. Slater didn't dissent from anything of that, as I remember. Mr. Farnum asked if we could work more men if we had them. I said yes; and he said he would send his men from South Boston; I told him I would set them to work; Emerson said men could be spared from Quincy Street bridge, and they came; company's men came that p. m. Five came from Quincy Street bridge, and five were sent by Farnum; the latter stayed there Friday afternoon and Saturday, and Emerson's men till bridge was ready for iron. This work was diligently prosecuted. We worked the next Sunday after this conversation, and part of the men worked nights. Company's work, not Emerson's, was done after 1st December; work under Old Colony railroad—capping piles and planking basin—was done by Barnes. Cutting through land was not done till after 1st December. Know nothing about gas and water pipes. Know of no delay in laying rails in consequence of the bridges being unfinished. There was delay from want of iron; don't know who was to furnish iron; no delay was caused by Emerson that I know of. The bridge-work was done on Cottage Street bridge December 12th. That was not the last bridge-work. After December 1st to the completion of the bridge-work, I should judge that $1,500 to $2,000 worth of labor and materials was laid out on the Cottage Street bridge. As to value of drain, I don't know; I was pretty busy at Cottage Street bridge. Defendant was there once to my certain knowledge besides the interview testified to. After November 14th, I never saw defendant

there that I recollect. He was there once in October. I was at Back Bay bridge frequently. Could'nt tell the amount of work done after December 1st, it would be a mere guess. I think more work was done from November 14th to December 1st than after December 1st. After November 14, know of no delay made by Emerson. Could have had work done on Cottage Street bridge by December 1st had I had men enough. The iron put on Cottage Street came from beyond Mount Bowdoin; don't know when the iron was bought; didn't know that iron had been bought of the Bay State Iron Co.; saw them putting down the iron; understood they had a quantity of iron. Don't know of any delay by Emerson; that's all I mean to say.

Question. Wasn't fault found by Farnum, Crane, and Hurd as to dilatory manner in which work was done?

Answer. Don't remember any, nor by Slater. Slater came out in October and complained. November 24 and in October are the only times I can say certainly Slater was on the bridges. Don't recollect that Slater said anything about work being delayed; don't recollect his saying anything to me; he was talking to Farnum.

Question. Had Slater left that bridge and gone away before Emerson came?

Answer. I am willing to swear Slater was there when Emerson came. Didn't hear him speak to Emerson.

J. D. Wiggin called for plaintiff.

I laid the rails for the corporation. I did go on all the bridges the plaintiff built. The last rail was laid December 21. Was not at any time delayed because the bridges were not ready, but I was delayad almost every day for want of iron. Some piles were driven by the corporation and capped after December 1st. The rails were all laid through South Boston after December 1st, 1854.

G. M. Quimby called by plaintiff.

I drove some piles for the corporation in South Boston after December 1st. They were not capped till afterwards. They had to be capped after they were driven. There was considerable work done by the corporation in South Boston; some excavation after December 1st. There was no delay because the plaintiff's bridges were not ready, but there was considerable delay for want of iron.

Hamilton Willis called by plaintiff.

I was never a director of the Boston and New York Central Railroad Company. I held its bonds for a large amount as collateral security, and had an interest and anxiety to increase the security, and took an active part in the affairs of the company, and saw the defendant almost every day from the date of the contract, Novem-

ber 14, 1854, till the completion of the work, and till the 1st January. I was active in getting the contract of November 14. The plaintiff did the bridge-work for the company. After the execution of the contract by the defendant, and before December 1st, in Slater's presence, who made no objection, I myself and Crane, one of the directors, told the plaintiff that all they wanted of him was to keep out of the way of the track-layers. The same thing was said after December 1st by Crane and myself in defendant's presence, and he made no objection.

The corporation was insolvent at the date of the contract between the plaintiff and defendant. It failed in July, 1854. They did not own their cars or any motive power; owned nothing but their franchise. After the work was done, the defendant promised to pay the plaintiff $10,000 if he would release the attachments of himself and Dillon on the real estate of the company. I was authorized by plaintiff and Dillon to release the attachment, and told Slater so, and he made no objection to my want of authority, nor said anything. His objection was solely that the attachment was not released. The corporation put securities into the hands of the defendant to indemnify him against his contract with the plaintiff deemed by him and them adequate at the time. These securities consisted of real estate and the bonds of the company for $17,000, secured by a mortgage upon the road. He holds these securities still, so far as I know. The defendant was very frequently upon the bridge-work both before and after December 1st. He knew the plaintiff was at work upon the bridges after December 1st, and of the progress of the work. I never heard any objection by the defendant to the time of the completion of this work till after this suit.

Elizur Barnes called for plaintiff.

I worked on the Cottage bridge for the corporation. It was finished on December 4. There was no delay on account of the bridges being unfinished. There was delay for want of iron.

Some of the work of the corporation was not done till after December 1st. There was some excavating through land in South Boston done after December 1st. The rails were not laid through South Boston till after December 1st, and gas and water pipes across the track were not cut off till the last of December, just before the trains began to run. There were piles driven and capped by the corporation after December 1st. This was no part of the plaintiff's work.

Charles Emerson recalled.

I have examined my books and papers since Saturday. I find that I paid for work done and materials furnished by me after December 1st $11,157 84. I have not had a dollar of this from any source. The defendant told me once he would pay me $7,000,

(this, I think, was in January,) on condition that I would procure a release of the attachment of myself and Dillon, and lease the engines to the company. I thought it was too little, and declined to do it. In the account which I have stated I presented to the committee in January, 1855, I charged the work to the company, and credited the money, $4,400, and notes of Slater.

Thereupon the court instructed the jury, and ruled, held, and decided that the plaintiff was not entitled to recover upon the common counts upon this testimony, and directed the jury to return a verdict for the defendant, to which instruction and direction the plaintiff then and there excepted; and thereupon the jury then and there returned a verdict for the defendant, in the words following, to wit:

The jury find that the defendant did not promise in manner and form as the plaintiff hath declared against him.

CHARLES H. BIGELOW, *Foreman.*

And inasmuch as matters referred to, and the several instructions, rulings, and directions of the honorable court so objected to, do not appear by the record or the verdict aforesaid, the counsel on the part of the said plaintiff prayed the honorable court to set their seal to this bill of exceptions, containing the several matters proved and given in evidence, and the rejections, rulings, and directions of his honor the judge thereupon, and the exceptions thereto, all of which being found to be true are allowed.

[SEAL.] In witness whereof, I have hereunto set my hand and seal.

(Signed) P. SPRAGUE, *Dis. Judge.*

U. S. A., CIRCUIT COURT OF THE U. S.,
Mass'tts District, ss:

I, Henry W. Fuller, clerk of the circuit court of the U. S. in and for the Massachusetts district and first circuit, do hereby certify that the foregoing is a true copy of the entire record and of all proceedings in the cause of Charles Emerson against Horatio N. Slater, in which a final judgment was rendered in our said circuit court, at the May term thereof, A. D. 1858, (exclusive of so much thereof as was reversed and set aside by direction of the Supreme Court of the U. S.)

In testimony whereof, I have hereunto set my hand and the seal of said circuit court this eighth day of July, A. D. 1858, and in the eighty-third year of the independence of the United States.

[SEAL.]

H. W. FULLER,
Clerk C. C. U. S. Mass. Dist.

3367

UNITED STATES, *ss:*

The President of the United States to the judges of the circuit court holden in and for the district of Massachusetts, greeting: [SEAL.]

Because that in the record and process, and also in the rendering of judgment in a suit before you or some of you, between Charles Emerson of Boston, a citizen of the State of Massachusetts, plaintiff, and Horatio N. Slater, of Providence, a citizen of the State of Rhode Island, defendant, in a plea of the case, a manifest error has intervened to the great damage of the said Emerson, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the Associate Justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government; that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness, the honorable Roger B. Taney, esquire, Chief Justice of the said Supreme Court, at Washington aforesaid, this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States the eighty-second.

H. W. FULLER, *Clerk.*

Allowed by

P. SPRAGUE,
Judge of U. S. Mass. Dist.

U. S. A., CIRCUIT COURT U. S.,
Mass. Dist., ss:

I, Henry W. Fuller, clerk of said court, in pursuance of the command contained in the within writ, do now make return thereof, and annex hereto and return herewith a true copy of the entire record and of all proceedings in the cause or suit within mentioned in our said court, (excepting so far as the same have been reversed and annulled by direction of the Supreme Court of the U. S.) I also annex the copy of the citation issued on said writ of error, and the marshal's return of service thereon, and do certify that a copy of this writ of error was filed and left in the clerk's office for the adverse party on the twenty-sixth day of June, A. D. 1858.

In testimony whereof, I have hereunto set my hand and the seal of said court, this eighth day of July, A. D. 1858.

H. W. FULLER,
Clerk C. C. U. S. Mass. Dist.